

1 JEREMY STANFIELD,

2 Plaintiff,

3 No. C-20-07000-WHA

4 v.

5 TAWKIFY, INC.,

6 Defendant.

7

8

9 **ORDER DENYING MOTION TO**
10 **COMPEL ARBITRATION**

11

12 **INTRODUCTION**

13 Defendant matchmaking service moves to compel arbitration against the named plaintiff
14 in a putative class action brought under California's Dating Services Contract Act.

15 **STATEMENT**

16 Jeremy Stanfield paid \$3700 to Tawkify, Inc. to arrange six dates, two of which occurred
17 but not to his satisfaction. He sought to cancel the contract and demanded a full refund. After
18 obtaining only a partial refund, Stanfield filed the present suit, anchoring his claims in
19 California's Dating Services Contract Act. Then he received a full refund.

20 Tawkify now seeks to compel arbitration of the matter. In signing up for the dating
21 service, Stanfield clicked on a box that said he had read Tawkify's terms of use (TOS). The
22 TOS is ten pages long with substantive terms covering nine pages. In a section on the last page
23 entitled "Governing Law," the second sentence provided: "As a condition of using Tawkify's
24 services, each user agrees that any and all disputes and causes of action arising out of or
25 connected with Tawkify, shall be resolved through arbitration, with such arbitration to be held
26 in San Francisco, California." The TOS provided no further details about arbitration, such as
27 who the arbitrator would be, who would pay, and so on.

1 Stanfield replies that the provision is unconscionable and should not be enforced. This
2 order agrees.

3 **ANALYSIS**

4 Both sides advance many arguments and counterarguments, but the way forward is plain
5 enough. Tawkify contends that this motion is controlled by our court of appeals decision in
6 *Tompkins v. 23andMe, Inc.*, 840 F.3d 1016 (9th Cir. 2016). Taking Tawkify at its word, the
7 instant order considers both District Judge Lucy Koh and Circuit Judge Sandra Ikuta's panel
8 analysis on unconscionability. After comparing the fact pattern in *23andMe* to the fact pattern
9 here, the instant order holds that, unlike *23andMe*, the agreement here is in fact
10 unconscionable, both procedurally and substantively, as follows.

11 *Tompkins v. 23andMe* considered the unconscionability of an arbitration agreement
12 imposed on customers who paid for a genetic testing service. *Tompkins v. 23andMe, Inc.*, No.
13 5:13-CV-05682-LHK, 2014 WL 2903752 (N.D. Cal. June 25, 2014), aff'd, 840 F.3d 1016 (9th
14 Cir. 2016). There, 23andMe made the TOS viewable to users at all relevant times via
15 hyperlink at the very bottom of 23andMe's website homepage but did not require users to view
16 the TOS before buying a genetic testing kit. After a purchase, customers had to create an
17 account and register their kit to submit saliva samples for testing. "The account creation page
18 require[d] customers to check a box next to the line, 'Yes, I have read and agree to the Terms
19 of Service and Privacy Statement.' The TOS and Privacy Statement appear[ed] in blue font
20 and [were] hyperlinks to the full terms . . ." *Id.* at 3. To register a kit, a customer would also
21 have to view a page that stated "To continue, accept our terms of service" prominently
22 displayed at the top of the page, then "click a large blue icon that [read] 'I ACCEPT THE
23 TERMS OF SERVICE' before finishing the registration process and receiving their DNA
24 information." *Ibid.* 23andMe's TOS stated:

25 **Applicable law and arbitration.** Except for any disputes relating
26 to intellectual property rights, obligations, or any infringement
27 claims, any disputes with 23andMe arising out of or relating to the
Agreement ("Disputes") shall be governed by California law
regardless of your country of origin or where you access 23andMe,
and notwithstanding of any conflicts of law principles and the
28 United Nations Convention for the International Sale of Goods.

1 Any Disputes shall be resolved by final and binding arbitration
2 under the rules and auspices of the American Arbitration
3 Association, to be held in San Francisco, California, in English,
4 with a written decision stating legal reasoning issued by the
5 arbitrator(s) at either party's request, and with arbitration costs and
reasonable documented attorneys' costs of both parties to be borne
by the party that ultimately loses. Either party may obtain
injunctive relief (preliminary or permanent) and orders to compel
arbitration or enforce arbitral awards in any court of competent
jurisdiction.

6 *Id. at 2.*

7 At the district court level, Judge Koh had differentiated clickwrap agreements from
8 browsewrap agreements, observing that “courts have tended to enforce the former but not the
9 latter”:

10 A clickwrap agreement presents the user with a message on his or
11 her computer screen, requiring that the user manifest his or her
12 assent to the terms of the license agreement by clicking on an icon.
By contrast, as this Court recently explained:

13 Browsewrap agreements are those that purport to bind the users of
14 websites to which the agreements are hyperlinked. Generally, the
15 text of the agreement is found on a separate webpage hyperlinked
16 to the website the user is accessing. The browsewrap agreements
17 are generally entitled “Terms of Use” or “Terms of Service.” The
defining feature of browsewrap agreements is that the user can
continue to use the website or its services without visiting the page
hosting the browsewrap agreement or even knowing that such a
webpage exists.

18 2014 WL 2903752 at 5–7 (quotations and citation omitted). Judge Koh held that the arbitration
19 agreement mixed elements of clickwrap and browsewrap as it allowed users to browse
20 23andMe’s website and make a purchase without displaying the arbitration agreement but
21 prompted users to check a box to assent to having viewed the hyperlinked TOS at the account
22 creation and registration phases. She found the TOS ineffective to bind website visitors or
23 customers who only purchased a DNA kit without creating an account or registering their kit, but
24 the TOS constituted a permissible clickwrap agreement after account creation and registration
25 because customers “receive[d] an opportunity to review the terms and conditions and must
26 affirmatively indicate assent.” *Id.* at 7. “The fact that the TOS [was] hyperlinked and not
27 28 affirmatively indicate assent.” *Id.* at 7. “The fact that the TOS [was] hyperlinked and not

1 presented on the same screen does not mean that customers lacked adequate notice.” *Id.* at 8.

2 At the district court level, the plaintiff also raised a question of mutuality in the
3 arbitration agreement. In support of their unconscionability argument, the plaintiffs contended
4 that the clause “any disputes with 23andMe” included only claims *against* 23andMe, so that
5 23andMe’s affirmative claims would not be subject to arbitration. Judge Koh rejected that
6 argument, holding that the language of the “arbitration provision plainly applie[d] equally to both
7 parties, and 23andMe does not take the position that this clause is a one-way street.” *Id.* at 17,
8 citing *Bigler v. Harker Sch.*, 213 Cal. App. 4th 727, 737–38 (2013) (rejecting argument that ‘any
9 dispute involving the School’ was a nonmutual restriction).

10 Still, Judge Koh found 23andMe’s arbitration provision to be procedurally
11 unconscionable because the contract was adhesive, surprising, and oppressive. She explained
12 that the provision’s adhesive quality stemmed from it being “a standardized clause drafted by
13 23andMe (who has superior bargaining strength relative to consumers) and presented as a take-
14 it-or-leave-it agreement, giving consumers no opportunity to negotiate any terms.” 2014 WL
15 2903752 at 15. Customers “received minimal notice of the arbitration provision, and only after
16 handing over their money.” *Id.* at 16. In her analysis, Judge Koh focused on the concealment
17 and opacity of 23andMe’s TOS in finding procedural unconscionability: “even if customers
18 locate[d] and click[ed] a hyperlink to the TOS, they must hunt for the arbitration provision
19 because the terms appear[ed] at the very end of the TOS as a subparagraph to the final section
20 titled ‘Miscellaneous.’ A customer who noticed the provision’s reference to the ‘rules and
21 auspices of the American Arbitration Association’ must still determine the scope of the provision
22 by searching for those rules” *Id.* at 14. She found that the failure to call out the AAA rules
23 (though it did call out AAA as the arbitrator) contributed to procedural unconscionability but
24 acknowledged that California courts were divided on the issue. *Id.* at 15.

25 On appeal, the parties did not dispute District Judge Koh’s finding of procedural
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1 unconscionability, so our court of appeals did not analyze it, focusing instead on substantive
2 unconscionability based on the plaintiff's challenge to "the provision's prevailing party clause,
3 the forum selection clause, and the clause excluding intellectual property claims from arbitration
4 . . . along with the one-year statute of limitations and 23andMe's right to modify the Terms of
5 Service." Id. at 15.

6 Turning to the instant case, a provision on the last page of Tawkify's agreement provided
7 (Def. Exh. B at 9) (bold in original, italics added):
8

9 **Governing Law**

10 This Terms of Use, your rights and obligations, and all actions
11 contemplated by this Terms of Use shall be governed by the laws
12 of the California. *As a condition of using Tawkify's services, each*
user agrees that any and all disputes and causes of action arising
out of or connected with Tawkify, shall be resolved through
arbitration, with such arbitration to be held in San Francisco,
California. Additionally, except where prohibited by law, as a
13 condition of using the Services, you agree that any and all disputes
14 and causes of action arising out of or connected to the Services
15 shall be resolved individually, without resort to any form of class
action. You also agree that regardless of any statute or law to the
16 contrary, any claim or cause of action arising from or related to the
use of the Services must be filed within one (1) year after such
17 claim or cause of action arose or be forever barred. The failure of
either party to exercise in any respect any right provided for herein
shall not be deemed a waiver of any further rights hereunder.
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19 With respect to procedural unconscionability, Tawkify's arbitration suffers from the same
20 problematic features as in *23andMe*: it was take-it-or-leave-it; users could not negotiate or opt
21 out; the provision was hidden on the last page under "Governing Law;" and there were no links
labeled "Arbitration."

22 More specifically, while the TOS was hyperlinked next to a checkbox at sign up and sign
23 in, nothing drew users' attention to Tawkify's arbitration requirement before (or after) they paid
24 for the service. Users who signed up for Tawkify would also confusingly be provided a "Client
25 Agreement" via email which included information and rules related to using Tawkify but said
26 nothing about arbitration or even the separate TOS (Opp. Exh. E at 5). If users ever found the
27 arbitration provision online, they would have had to dig for it. The arbitration provision was a
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needle in a haystack, with the word arbitration appearing only twice in the ten-page document and referenced in a single sentence only, never bolded. Not only did the section title make no reference to arbitration — it simply called itself “Governing Law.” The section lay on the very last of nine information-overloaded pages. The TOS contained no other mention of arbitration. This order holds that plaintiff has established that the arbitration requirement was highly procedurally unconscionable.

Turning to substantive unconscionability, our court of appeals in *23andMe* explained:

Under California law, [a]n evaluation of unconscionability is highly dependent on context. California courts give the parties a reasonable opportunity to present evidence as to [the provision's] commercial setting, purpose, and effect, Cal. Civil Code § 1670.5, and then examine the context in which the contract was formed and the respective circumstances of the parties as they existed at the formation of the agreement.

Tompkins v. 23andMe, Inc., 840 F.3d 1016, 1023 (9th Cir. 2016) (citations and quotations omitted).

Unlike the provision in *23andMe* that specified AAA arbitration, the provision here did not specify any arbitrator, much less any rules. This oppressed users by keeping them guessing about how an arbitrator or arbitrators would be chosen or what rules would apply. This created a major problem by leaving huge amount to future guesswork, negotiation or litigation, all simply to determine the basic arbitration framework in the first place. This uncertainty loomed over any grievance raised by the user as a heavy unknown, an unknown that would cost money to resolve. In all likelihood, the user would have to sue to ask a judge to figure out who the arbitrator(s) should be, what rules would apply, what discovery would be allowed, and who would pay for the arbitrator, all of this before a single step in any arbitration. This heavy burden of uncertainty and expense effectively eviscerated any remedy to the ordinary consumer user.

The second problem is lack of mutuality. “Lack of mutuality is relevant to assessing substantive unconscionability.” *Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1001 (9th Cir. 2010).

1 Tawkify's arbitration requirement was a one-way street — only the user promised to arbitrate.

2 Tawkify made no such promise (Def. Exh. B at 9) (emphasis added):

3 As a condition of using Tawkify's services, each user agrees that
4 any and all disputes and causes of action arising out of or
connected with Tawkify, shall be resolved through arbitration, with
such arbitration to be held in San Francisco, California.

5 Tawkify replies that the agreement must now be interpreted to require Tawkify to
6 arbitrate all its disputes as well. It would have been easy to say so in the TOS or to use the
7 same wording as in *23andMe* but Tawkify didn't. It kept its options open and only now, when
8 it's convenient, claims it promised to arbitrate all such disputes.

9
10 Other provisions of the TOS show that Tawkify knew how to make a promise (Def. Exh.
11 B at 1):

12 We hold your privacy sacred. Pursuant to the Privacy Policy, we
13 will not disclose your photos or identifying information without
your permission to prospective matches, nor theirs to you.

14 In other words, Tawkify wanted to promise, it knew how to write the words. Elsewhere the
15 TOS stated "Tawkify reserves the right, in our sole discretion, to change these Terms of Use at
16 any time," giving Tawkify, but not the user, the power to modify the terms (Def. Exh. B at 1).

17 Under other terms of the TOS concerning "[i]llegal and or unauthorized use," Tawkify
18 could take "appropriate legal action . . . including without limitation, civil, criminal, and
19 injunctive compensation" (Def. Exh. B at 2). This provision clearly contemplated a lawsuit in
20 court, but only by Tawkify, not by the user.

21 By contrast, the mutuality of the arbitration provision in *23andMe* arose from
22 distinguishable language stating that "any [d]isputes shall be resolved by final and binding
23 arbitration . . ." 2014 WL 2903752 at 2. Tawkify's agreement used similar "any and all"
24 language but, importantly, had the additional limitation that "the user agrees" which framed the
25 arbitration obligation exclusively in terms of the *user's* obligation.

1 “Where an arbitration agreement is concerned, the agreement is unconscionable unless
2 the arbitration remedy contains a modicum of bilaterality.” *Ting v. AT&T*, 319 F.3d 1126,
3 1149 (9th Cir. 2003) (citation omitted). Here, the TOS refused users even a crumb of
4 bilaterality because users had to subject their claims to arbitration, while Tawkify could go to
5 court.

6 Our court of appeals found 23andMe’s arbitration agreement not to be substantively
7 unconscionable despite the provision excluding “any disputes relating to intellectual property
8 rights, obligations, or any infringement claims” from mandatory arbitration. But this too is
9 distinguishable from our case. Despite finding that plaintiff failed to prove substantive
10 unconscionability, our court of appeals acknowledged the argument that 23andMe’s arbitration
11 provision problematically “reserved for itself the advantages of a judicial forum while forcing
12 customers to use the arbitral forum,” and stated that “such a theory finds some support in
13 California law.” 840 F.3d 1016 at 1030. Citing to *Armendariz v. Found. Health Psychcare*
14 *Servs., Inc.*, our court of appeals pointed out that there “an arbitration provision in an
15 employment agreement was unconscionably unilateral (and thus unenforceable) because,
16 among other things, it required the employee to arbitrate all wrongful termination claims
17 against the employer but gave the employer a choice of forums for its claims.” *Id.* at 1030,
18 citing 24 Cal. 4th 83 (2000).

19 The *23andMe* decision went on to clarify that the California Supreme Court had
20 reformed the interpretation of *Armendariz* in two ways. It noted California law had since
21 “backed away from . . . assumptions regarding the inferiority of the arbitral forum” finding “no
22 inherent disadvantage” to using this version of dispute resolution. 840 F.3d 1016 at 1030
23 (citations omitted). It also pointed out that the California Supreme Court had since clarified
24 that “a one-sided contract is not necessarily unconscionable.” *Id.* at 1031. Applying these
25 considerations to the consumer arbitration clause in *23andMe*, our court of appeals found that
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1 the arbitration contract's exclusion of intellectual property disputes was not unconscionable
2 because "to the extent 23andMe has valuable intellectual property rights in its website and
3 database, it is entitled to an extra margin of safety based on legitimate business needs." *Ibid.*

4 This order distinguishes its finding of substantive unconscionability from *23andMe* for
5 three reasons. *First*, Tawkify placed no reasonable parameters on its exemption from a mutual
6 obligation to arbitrate, while in *23andMe* the arbitration agreement limited the scope of the
7 exemption to only intellectual property disputes. For all other disputes, *23andMe*'s arbitration
8 agreement established a mutual obligation between *23andMe* and its customers, as explained
9 by Judge Koh's analysis of the agreement. 2014 WL 2903752.

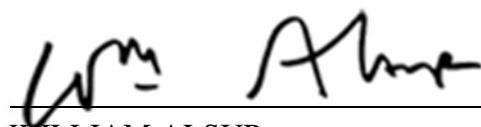
10
11 *Second*, unlike the clear language in *23andMe*'s arbitration agreement that alerted
12 consumers to the exclusion of intellectual property disputes from arbitration, Tawkify's
13 arbitration provision did nothing to warn users of Tawkify's exemption from the duty to
14 arbitrate (nor of any other specifics of the arbitration process for that matter). To have any
15 hope of discovering this lack of mutuality, Tawkify users would have to piece together the
16 arbitration agreement's silence with other provisions of the TOS.
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18 *Third*, Tawkify has presented no reasons why its one-sided arbitration agreement satisfied
19 any legitimate business needs. Indeed, this Court can find none. The arbitration agreement at
20 issue here left more than a mere margin of safety for Tawkify.

21 For the foregoing reasons, defendant's motion to compel arbitration is **DENIED**.
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24 **IT IS SO ORDERED.**

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26 Dated: February 3, 2021
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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE